Service Spring Company, a Division of Garlock, Inc., a wholly-owned subsidiary of Colt Industries *and* United Steelworkers of America, AFL-CIO-CLC, District 30 *and* David Brandenburg, Steven E. Anderson, Roger K. Smith, Louie Bray, and James Patterson, Jr. Cases 25-CA-11409, 25-CA-12082, 25-CA-12113, 25-CA-11965, 25-CA-12021, 25-CA-12049, 25-CA-12090, and 25-CA-12191

August 31, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 2, 1981, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, the Respondent and the General Counsel filed exceptions and supporting briefs, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge,[2] as modified herein,[3] and to adopt his recommended Order. Accordingly, we find that the Respondent engaged in conduct violative of Section 8(a)(1) and discharged employee Kimes in violation of Section 8(a)(3).

In addition to the unfair labor practices we have found, our dissenting colleague would find that the Respondent unlawfully tightened its discipline policy regarding absenteeism and production mistakes, and discriminatorily discharged employees Smith and Bray. Relying upon the other unfair labor practices, most of which occurred earlier during the Union's organizational campaign,[4] and upon the timing of the Respondent's decision to more rigidly enforce discipline, our colleague rejects the economic reasons offered for the decision. We do not agree. While the other unfair labor practices and the timing of the decision must be considered in determining the Respondent's reason for tightening discipline, we conclude that the evidence does not establish that adoption of a stricter enforcement policy was due to union considerations. Rather, it appears to us that the policy was undertaken by the Respondent in an attempt to improve production efficiency.

In November 1979 a new president, Correll, assumed responsibility over the Respondent's operations.[5] According to Correll, whose testimony was credited in this respect by the Administrative Law Judge, when he began his duties he made some changes in supervision and spent much time touring the plant, studying the manufacturing operations, and talking with employees. Through his observations, he became aware of serious confusion and disorganization at the start of shifts due to the large number of absences that required reassigning permanent employees from their regular jobs and obtaining employees from a temporary employment service to perform less skilled jobs. The reassignments and use of temporary employees resulted in loss of production time, inefficient use of personnel, and greater need for supervision. Correll also noted that the plant experienced a substantial number of production mistakes that required recutting materials and duplicating work. He then initiated a system of periodic and detailed reports on absenteeism and manufacturing errors so that he could check the problems and maintain consistent discipline throughout the plant, and implemented a more rigid enforcement of discipline with respect to absenteeism and production mistakes. He also instituted changes in the quality control procedures.

We conclude from all the facts that the Respondent presented a convincing business justification for the stricter enforcement policy it adopted, and we accept the Administrative Law Judge's determination that these economic considerations were not a pretext for retaliation against employees for union activity.

We also disagree with our dissenting colleague's conclusion concerning the discharges of employees Smith and Bray. We see no basis for rejecting the Administrative Law Judge's recommendation that complaint allegations regarding these discharges be

[1] We note, as pointed out by the Respondent, that employee Jump testified that in a meeting with employees Foreman Durham did not say anything about making it hard on employees because they made it hard on the Company; and that employee Hunter testified that Foreman McCombs, not Foreman Durham, stated that employees would be watched and company rules be more strictly enforced.

[2] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] Contrary to the Administrative Law Judge, we find that the issue of Foreman Durham's interrogation of employee Bray was litigated at the hearing and that the interrogation violated Sec. 8(a)(1) of the Act.

[4] Contrary to the dissent's view of our decision, we have not found that after the election the Respondent more strictly enforced rules about employees' taking breaks and going to vending machines. We have found, like the Administrative Law Judge, that it was during the organizational period before the election that the Respondent advised employees of a stricter rule about taking breaks and using the vending machines.

[5] The record does not show that this change in management was related to union organization.

dismissed. We have found that the policy of more strictly enforcing discipline that was applied to Smith and Bray was not unlawfully implemented. Furthermore, these two employees made substantial errors which might have provoked discharge even under a more lenient disciplinary policy.

CONCLUSIONS OF LAW

1. Service Spring Company, a Division of Garlock, Inc., a wholly-owned subsidiary of Colt Industries, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America, AFL-CIO-CLC, District 30, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging and refusing to reinstate Patrick Kimes because of his union activity, and by enforcing more strictly work rules regarding taking breaks and going to the vending machines, the Respondent has engaged in discrimination in violation of Section 8(a)(3) of the Act.

4. By the aforesaid discrimination and by interrogating employees, threatening employees with reprisal and surveillance, ordering employees not to wear union insignia, soliciting grievances and impliedly promising to resolve such grievances, and granting employees benefits in the form of improved working conditions, the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Service Spring Company, a Division of Garlock, Inc., a wholly-owned subsidiary of Colt Industries, Indianapolis, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

MEMBER JENKINS, dissenting in part:

I agree with my colleagues' findings that the Respondent engaged in substantial conduct violative of Section 8(a)(1) and (3) of the Act. Unlike my colleagues, however, I also find that the Respondent violated Section 8(a)(3) by imposing stricter discipline for absenteeism and work mistakes and by discharging employees Roger K. Smith and Louie Bray.

My colleagues adopt the Administrative Law Judge's Decision to dismiss these additional 8(a)(3) allegations even though he failed to analyze or weigh crucial relevant evidence bearing on these issues. In each instance, the Respondent had previously threatened the particular unlawful action. In each instance, the Respondent carried out its announced plan to punish union supporters. The Administrative Law Judge's failing to consider the unlawful threats as part of the evidence bearing on these 8(a)(3) allegations was a plain and substantial error.

In dismissing the allegations of stricter discipline for absenteeism and work mistakes, the Administrative Law Judge found, *inter alia*, that "the only evidence of an unlawful motivation . . . is the fact that they followed the election . . . . There is no independent evidence that the Company undertook them for discriminatory reasons."[6]

Independent evidence of the Respondent's unlawful motivation for imposing stricter discipline on employees after the election is readily established by credited record evidence and by the Administrative Law Judge's own findings elsewhere in his Decision. Thus, the Administrative Law Judge found that the Respondent violated Section 8(a)(1) by, *inter alia*, "[t]hreatening employees with stricter enforcement of rules or other reprisals because they engaged in activity on behalf of the Union," and "[d]iscriminating against employees by enforcing work rules more strictly because of their interest in or activity on behalf of the Union." Such conduct during the election campaign bears directly on the Respondent's motivation for imposing stricter discipline for absenteeism and work mistakes after the election.

Indeed, there is separate independent evidence that the Respondent's union animus during the organizational campaign spilled over and continued after the Union won the representation election. The Administrative Law Judge found, and my colleagues agree, that the new president, Correll, unlawfully interrogated an employee 3 weeks after the election and that Manufacturing Superintendent Tatman unlawfully threatened an employee that the Union would cost people jobs at a time when unlawful changes were being made. In addition, there is no dispute that stricter discipline for certain offenses was imposed beginning immediately after the representation election. Thus, the Re-

[6] The Administrative Law Judge's treatment of this issue appears in his Decision at sec. III,B, "4. The allegations in Case 25-CA-12113."

spondent's new president, Correll, admitted implementing stricter discipline practices for absenteeism and work mistakes. Further, the Administrative Law Judge found, and my colleagues agree, that the Respondent violated Section 8(a)(3) after the election by its stricter enforcement of rules about taking breaks and going to vending machines. The Administrative Law Judge's failure to weigh this substantial unlawful activity that bears directly on the Respondent's motive for changing its work rules and its stricter enforcement of them exposes his, and my colleagues', mistake in treating this allegation.

Turning to the Respondent's economic justification for its actions, the Administrative Law Judge limited his discussion to the effects of the policy changes and gave only cursory treatment of the timing of the changes. He found that, as a consequence of applying stricter attendance requirements which resulted in using fewer less productive temporary employees, "the payroll cost per pound of product was reduced." And he found that "[a]lthough there may be some room for argument concerning how much it costs the Company for an employee to make a mistake on a given job, there is no dispute that manufacturing mistakes affect productivity." The question is not, however, simply whether policy changes and stricter enforcement of work rules resulted in savings to the Company.[7] Rather the question that also must be answered concerns the Respondent's motive for making the changes when it did.

A careful review of the Administrative Law Judge's Decision on these allegations (Case 25–CA–12113) reveals that the only reason he mentions that has a bearing on the Respondent's choice of timing for the changes was that they "followed a change in management." Even assuming "a change in management" is a valid factor supporting economic justification, reliance on it here is misplaced for a number of reasons. First, the Administrative Law Judge himself found that the stricter enforcement of rules about taking breaks and going to vending machines violated Section 8(a)(3) of the Act. But these violations also took place after the "change in management," and the Administrative Law Judge, properly, did not find that this factor excused such conduct. Secondly, it is significant that the change in management and the alleged changes in practices regarding attendance and work errors occurred shortly after the representation election.

That an employer acts at its peril in making changes during the pendency of objections to an election which eventually results in the certification of the union, as here, is well established.[8] This well-established principle loses none of its force simply because an employer brings in a new management team after an election. These new managers are bound by the same principle. Moreover, this new management team was itself responsible for independent violations of Section 8(a)(1) of the Act. Thus, new President Correll unlawfully interrogated an employee 3 weeks after the election and Manufacturing Superintendent Tatman unlawfully threatened an employee that the Union would cost people jobs at a time when these alleged unlawful changes were occurring. Furthermore, there is no record evidence that the Respondent notified the Union that it was planning to make these changes or solicited the Union's views on them.[9]

In these circumstances, the Respondent has failed to present a legitimate and substantial business justification for the timing of the stricter enforcement of rules concerning attendance and work errors. Instead, I find the changes were in retaliation for the employees' union activities, for the reasons more fully described above, but particularly the unlawful threats during the election that such changes would occur and that the changes did in fact occur shortly after the election. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act by imposing stricter discipline for absenteeism and work mistakes.

Turning to the discharge of employees Smith and Bray, it is clear that both men were well-known union adherents. Further, each man had been interrogated during the union campaign by the Respondent.[10] Each man also was the object of the Respondent's unlawful threats that the Union

[7] The Respondent presented reports in summary form purporting to show that its operations became more productive after rules governing absenteeism and work mistakes were more strictly enforced. No actual production reports, however, were presented to show levels of production before and after the changes. Nor were documents presented indicating a concern about these problems prior to the union organizational campaign. Though the general proposition that improvements in attendance and decrease in work mistakes will contribute to improved productivity is reasonable, the Respondent has failed to establish a convincing basis by its documentary evidence not only that improved productivity followed directly from these changes (as opposed to better machine maintenance or increased supervision among other factors) but also for the timing of the changes. Instead, we are left with "the change in management," discussed elsewhere, to explain the timing of these changes.

[8] *Mike O'Connor Chevrolet-Buick-GMC Co., Inc., and Pat O'Connor Chevrolet-Buick-GMC Co., Inc.*, 209 NLRB 701, 704 (1974). *Hillcrest Furniture Manufacturing Co., Inc.*, 253 NLRB 72, 73 (1980).

[9] The only reason given by the Administrative Law Judge for dismissing the 8(a)(5) allegations concerning these changes is that there is no evidence that the Union was not notified. No exceptions have been filed to that finding.

[10] Smith was interrogated unlawfully by Tatman in October. Bray was interrogated unlawfully by Durham in January. The Administrative Law Judge found that Smith's interrogation violated Sec. 8(a)(1) and my colleagues found that Bray's interrogation violated Sec. 8(a)(1). I agree.

would cost employees' jobs.[11] Despite the Administrative Law Judge's own findings, adopted by my colleagues, that Smith and Bray were victims of the Respondent's 8(a)(1) conduct, he neglected to consider this conduct before dismissing the discharge allegations.

In addition, it is plain that the discharge of these two men occurred after the Respondent unlawfully threatened stricter enforcement of work rules and after the Respondent began implementing such stricter discipline. Each man's job was changed after the election. Each man was discharged for a work mistake in the new job. Smith was transferred from the wrap machine to the sheer machine and was discharged in March for miscutting a piece of steel. Bray was assigned to operate the crane and was discharged in April for breaking a scale while lowering a bundle of steel. It cannot be gainsaid that the discharges of both Smith and Bray were pursuant to the Respondent's revised work rules that included stricter discipline for work mistakes.

Thus, it is plain that the General Counsel has shown not only the traditional elements of animus, knowledge, and timing in demonstrating that the two discharges were for discriminatory reasons but also evidence that the Respondent had threatened such discharges and that the discharges were pursuant to a discriminatorily implemented policy of stricter discipline for work mistakes. Accordingly, I find that the discharges of employees Smith and Bray violated Section 8(a)(1) and (3) of the Act.

[11] Smith was threatened unlawfully by Durham shortly before the election. Tatman unlawfully threatened Bray in late December or early January. Both threats were found to be violative of Sec. 8(a)(1) by the Administrative Law Judge and my colleagues. I agree.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This matter was heard before me on various dates from September 24 through October 15, 1980, at Indianapolis, Indiana, upon the General Counsel's consolidated complaints which allege principally that the Respondent discharged five employees in violation of Section 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*; engaged in certain activity violative of Section 8(a)(1); and instituted changes in terms and conditions of employment in violation of Section 8(a)(5).

The Respondent generally denied that it has engaged in any activity violative of the Act and, while admitting the discharges in question, contends that each employee was discharged for cause. The Respondent further denied that it unilaterally instituted any changes in employees' working conditions.

Upon the record[1] as a whole,[2] including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

Service Spring Company (herein the Respondent or the Company) is a division of Garlock, Inc., a wholly-owned subsidiary of Colt Industries. The Company is engaged in the production, sale, and distribution of leaf springs for motor vehicles. It annually receives goods, products, and materials directly from points outside the State of Indiana valued in excess of $50,000 and annually ships finished products directly to points outside the State of Indiana valued in excess of $50,000. The Respondent admits and I find that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Steelworkers of America, AFL-CIO-CLC, District 30 (herein the Union), is admitted to be and I find is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *General Facts*

During the times material hereto, the Respondent had about 100 production and maintenance employees on 3 shifts, with the day (7 a.m. to 3 p.m.) shift being the largest. In general the Respondent operates a lineal assembly line. Steel strips of various widths and thicknesses are delivered to the Respondent and are stored until used. When there is an order for a particular size and quantity of spring, the appropriate thickness and width of steel is cut, drilled, "wrapped," put through a heat treating process, assembled into finished steel springs, and then shipped. In addition to the production employees who perform these operations, the Respondent has a maintenance department responsible for service and repair of the various machines and equipment.

In the summer of 1979, employees, led by Ray Hunter, began an organizing campaign. Hunter appears to be well respected by management and fellow employees both for his work and his integrity. He is a leader among employees, and is consulted from time to time by management. Hunter contacted the Union in early August and along with some 13 other employees met with an organizer. They signed authorization cards and distributed others among employees at the plant.

On October 6, 1979, a Stipulation for Consent Election was executed by the Union and the Company. The election was held on November 1. The tally of ballots shows that of approximately 99 eligible voters, there were 51 votes cast for the Union and 47 against it. The Respondent filed objections to conduct affecting the results of the

[1] Certain errors in the transcript are hereby noted and corrected.
[2] G.C. Exhs. 15-21 are received.

election which were overruled by the Regional Director on December 12. Review was requested and on April 15, 1980, the Board sustained the Regional Director and certified the Union as the exclusive collective-bargaining representative for the employees in a standard production and maintenance unit.

During the time of the organizational campaign, Richard G. Yard was the Company's president and James Brewer was the plant superintendent. They, along with other supervisors, are alleged to have engaged in many acts violative of Section 8(a)(1): including interrogation of employees, surveillance of employees' union activities, and threats of reprisal. In addition, it is alleged that Brewer discharged employee Patrick Kimes on September 28, 1979.

On November 4, Randy Correll, who had been the chief financial officer of the Truck Products Division of Garlock, Inc., which included the Respondent, became the Respondent's president, although he had no experience as an operating officer.

Since January 1980, Don Tatman, who spent most of his 6 years with the Respondent as a salesman and later as Brewer's assistant, became the manufacturing superintendent. Brewer's duties were generally phased out preparatory to his retirement in 1980.

It is alleged that Correll more strictly enforced company rules concerning attendance and increased discipline for attendance and manufacturing mistakes in order to retaliate against employees because of their union activity in violation of Section 8(a)(3). It is also alleged Correll did not inform the Union of these prospective changes or negotiate with it concerning them, thus violating Section 8(a)(5).

Finally it is alleged that the Respondent violated Section 8(a)(3) by discharging Patrick Kimes on September 28, 1979; by giving Steve Anderson verbal and written warnings in early 1980 and suspending him on April 7; giving Roger Smith a verbal warning and discharging him on March 13; suspending Louie Bray for 3 days on February 8 and discharging him on April 14; and giving James Patterson, Jr., a verbal warning, a written warning, a 3-day suspension, and discharging him on April 15.

The Respondent admits that it more strictly enforced its rules concerning attendance and did increase discipline for manufacturing mistakes following Correll's taking over as president. The discipline and discharge of the employees named above on the dates indicated are also admitted. The Respondent contends, however, that all this was in an effort to make the Company more productive, which in fact has been the result. Further, the employees who were discharged were discharged for cause; and finally, there is no evidence that the Respondent failed to notify or negotiate with the Union concerning the alleged changes in terms and conditions of employment.

Although the specific allegations of unfair labor practices will be treated individually herein, in general I conclude that the Respondent did engage in certain unfair labor practices, including the unlawful discharge of Kimes, during the course of the organizational campaign.

However, I further conclude the General Counsel did not establish that the more strict enforcement of the attendance and work rules was unilateral. Proof of the Respondent's failure to notify or negotiate with the Union is necessary to make out a *prima facie* violation of Section 8(a)(5) in this regard. There is no evidence the Union was not notified.

While it was established that in fact the Respondent did increase its discipline of employees for attendance and manufacturing mistakes, I conclude that ample business reason to do so was demonstrated. Though such increase in discipline may be *prima facie* discriminatory, on the total record here, I conclude that it was not unlawful.

And finally, I conclude that the discharges of Smith, Bray, and Patterson were motivated by cause and not by their having engaged in any activity protected by the Act. The allegations concerning discriminatory warnings and the suspension of Steve Anderson were withdrawn by the General Counsel.

B. *Analysis and Concluding Findings*

1. The allegations in Case 25–CA–11409

The allegations in this complaint deal with the Respondent's preelection activity and specifically interrogation, threats, requiring employees to remove union insignia, instructing supervisors to keep employees under surveillance, soliciting grievances from employees, improving working conditions, altering disciplinary practice against employees (not that involving Correll in January), and finally the discharge on September 28, 1979, of Patrick Kimes.

I conclude that in large part the allegations in this complaint have been established by preponderance of the credible evidence. Indeed, there is little factual dispute concerning these events.

David Matthews was a foreman until his discharge by Yard, along with Al Combs, in early October because they had not done enough to keep the Union out. (The events surrounding these discharges were not alleged violative of the Act.)

Matthews testified that he heard discussion about the Union among employees in the summer of 1979. He took this information to Brewer and Tatman who told him to keep listening and make reports concerning what he discovered about the organizational campaign. Matthews testified that beginning in June or July he talked to each employee under his supervision asking him about his interest in the Union. (The union activity did not, from Hunter's credited testimony, start until July.) In any event, Matthews further testified that, at two meetings of supervisors in July, Yard told them to tighten down on employees.

Matthews' testimony concerning his conversations with Brewer and Tatman was undenied by them.[3] Nor

[3] Matthews' explanation of why certain material facts to which he testified were left out of his affidavit, along with his demeanor in testifying to these events, suggests that his testimony is unreliable, or at least should not be credited over more reliable witnesses. Nevertheless, his testimony concerning what Yard, Brewer, and Tatman told supervisors is undenied. His testimony concerning his interrogation of employees is consistent with the general preelection atmosphere as testified to by other witnesses. Thus, I credit Matthews' testimony concerning these events.

did they deny the substance of Yard's comments at the supervisors' meetings. Yard did not appear as a witness.

The record establishes that in fact Foreman Matthews did individually interrogate employees concerning their union interest and activity without following the appropriate safeguards established by the Board. Through him the Respondent violated Section 8(a)(1) of the Act as alleged in the complaint, as amended at the hearing.

In addition, it is clear that Matthews was in fact instructed to keep employees' union activities under surveillance. In paragraph 5(d) of the complaint such is alleged to be violative of Section 8(a)(1). Without some showing that the Respondent's instructions to supervisors were in some way communicated to employees, such is not violative of the Act. Interference with employees' Section 7 rights presupposes that the employees know the event occurred. I shall therefore recommend this paragraph of the complaint be dismissed.

Ray Hunter, as well as other witnesses on behalf of the General Counsel, testified that, shortly after the beginning of the organizational campaign, Foreman Roy Durham met with all the employees under his supervision and told them, among other things, that they would be watched and that the company rules would be more strictly enforced. Others testified that during these meetings Durham stated that inasmuch as the employees were "making it hard" on the Company, the Company was going to "make it hard" on them.

The statements attributed to Durham were not denied by any witness on behalf of the Respondent nor was Durham called to testify. Accordingly, I conclude that Durham, as alleged, did threaten employees with reprisals for their having engaged in activity on behalf of the Union and by this the Respondent violated Section 8(a)(1) of the Act.

Similarly, Brewer is alleged to have threatened employees with stricter enforcement of rules and unspecified reprisals if they did not refrain from becoming members of the Union or giving support to it. Specifically, the General Counsel contends that, when discharging Kimes on September 28, Brewer stated, according to the undenied testimony of Kimes, "You fellows made [it] rough on us we're going to make it rough on you." While I find this statement was made, rather than a threat of prospective action, it was a statement by Brewer giving his reason for discharging Kimes. I conclude that it is evidence of the Respondent's unlawful motive in discharging Kimes, *infra*, but not, as alleged, a threat.

On or about September 25 at least half of the production and maintenance employees on the first shift wore union buttons and stickers on their hard hats. Upon seeing this, Brewer's immediate reaction was to tell employees that the "union buttons had to go." Later, apparently, Brewer discovered that he was wrong in ordering employees to take off the union buttons and stickers. He approached Hunter and apologized. Although Brewer's injunction to employees was retracted shortly after made, at least to Hunter, I nevertheless conclude that his telling employees they could not wear union insignia in effect was the promulgation of an unlawful no-solicitation rule. Accordingly, Brewer's act interfered with employees' Section 7 rights and was violative of Section 8(a)(1) of the Act. Although not alleged in this complaint, on the same day at or about the same time Tatman told other employees the same thing, later making a retraction as had Brewer. As these retractions did not fully remedy the unfair labor practice, I shall recommend an appropriate order.

The day after the union button incident, Yard contacted Hunter to tell him that, "I am mad and I am damn mad." Yard said he was mad because of some kind of statement Hunter was supposed to have made to another employee. Yard accused Hunter of lying when he denied it. Yard closed with the statement that Hunter "will be watched." Hunter's testimony about this event was credible and undenied. Inasmuch as Hunter was the principal leader of the union campaign among employees, and the alleged incident involved the campaign, it is clear that Yard's statement that he would "be watched" was a threat that the Company would keep employees' union activity under surveillance. Such was violative of Section 8(a)(1) of the Act.

Although somewhat unclear, it appears that the allegations in paragraph 5(f)—that the Respondent engaged in an "extensive campaign of soliciting grievances"—refers to the conversations Matthews had with employees in September. Matthews did testify, and without contradiction, that when interrogating employees he also asked them what their problems were and told them that the Company was "working on them." Although it is common for supervisors to ask employees about problems in the context of other unlawful activity and impermissible interrogation, such amounts to solicitation of grievances and the implied promise that they would be resolved. Such is violative of Section 8(a)(1) of the Act and I so conclude.

The General Counsel contends in complaint paragraph 6(a)(i) that the Respondent violated Section 8(a)(3) of the Act by improving working conditions for employees by "painting and repairing the bathroom, putting in a new lockerroom and installing a microwave oven." That the Respondent in fact made the improvements alleged is undisputed and indeed confirmed by documentary evidence. While there is some question concerning the precise timing of these improvements, there appears to be little question that such was during the organization campaign. More specifically, Hunter credibly testified that the improvements were made by the Respondent following the advent of the union activity, sometime in September.

I find that the Respondent did make substantial improvements to the employees' working conditions at a time when they were engaged in union activity. The Respondent did not satisfactorily explain the timing of these improvements with that activity. Further, there is no reason to believe that the employees would not view these improvements as benefits in order to persuade them from favoring the Union. Accordingly, I conclude that the Respondent's improvement of working conditions was a benefit in violation of Section 8(a)(1) of the Act. *N.L.R.B.* v. *Exchange Parts Company*, 375 U.S. 405 (1964). Since there is no showing how the grant of a

benefit to all employees is discriminatory, I do not believe in this respect the Company violated Section 8(a)(3). Cf. *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

It is further alleged that the Respondent discriminated against employees by altering its previous practice concerning the enforcement of work rules and specifically denying employees the freedom to go to the vending machine area and otherwise take short breaks when they desired. Based on the credited testimony of Hunter, I conclude that during the organizational campaign the Respondent did advise employees of a stricter enforcement of work rules in the manner indicated. Statements to this effect made by Foreman Durham during his meetings with employees during the organizational campaign, *supra*, were violative of Section 8(a)(1). Inasmuch as the threats were, to some extent at least, carried out, I conclude that Respondent did violate Section 8(a)(3) as alleged.

Finally, it is alleged in this complaint that Patrick Kimes was discharged for having engaged in union activity in violation of Section 8(a)(3). Kimes was one of the employees involved in the union activity and was known to be a supporter of the Union. On September 25, he wore a union sticker and button and was so observed by Tatman.

Brewer testified that Kimes was discharged for absenteeism, only, on September 28. While Kimes' record does show a questionable attendance record, he was never warned that absenteeism or tardiness would result in discipline or discharge. Nor does the Respondent contend that Kimes was warned by Brewer or anyone else.

Although records indicate that prior to the advent of the union activity other employees were disciplined and discharged for absenteeism, the evidence preponderates in favor of finding that employees were never discharged for such prior to having received at least some preliminary warning. I therefore conclude that the Respondent's claim that Kimes was discharged solely for absenteeism was such a substantial departure from its past practice as to create the inference that it is not true.

Further, I conclude that the true motive behind the Respondent's discharge of Kimes was his union activity in specific and generally to discourage other employees from favoring the Union. He was known to be a union activist; his discharge took place in the middle of the organizational campaign. And, even Brewer testified that Kimes was a "good employee," even though he had worked for the Respondent only a short time. These factors, along with the failure to warn Kimes, establish *prima facie* that the discharge was motivated by the union activity. The Respondent's evidence that the discharge would have occurred even absent the union activity is unpersuasive.

I therefore conclude that the General Counsel has sustained the burden of proving that Kimes was discharged in violation of Section 8(a)(3) of the Act and I will recommend an appropriate remedial order. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

2. The allegations in Case 25-CA-11965

Although the charge in Case 25-CA-11965, wherein David Brandenburg is the Charging Party, alleges discrimination against Brandenburg, there is no such allegation in the consolidated complaint. Apparently the allegations in the consolidated complaint involving this case concern certain activity alleged violative of Section 8(a)(1) occurring before the election and immediately thereafter.

Thus, it is alleged that in October Tatman interrogated employees concerning their union activity. The evidence supporting this allegation involves a conversation testified to by Roger Smith during which Tatman asked him about his and other employees' union activity and indicated that, in the event the Union was not successful, the Company planned to build a new plant which could mean a promotion for an employee such as Smith. While I generally found Smith to be an incredible witness, *infra*, this testimony was undenied by the Respondent and generally fits within the preelection campaign waged by the Respondent. Accordingly, I do conclude that as alleged Tatman interrogated an employee in violation of Section 8(a)(1) and, though not alleged, clearly made an unlawful promise of benefit.

It is alleged that, on or about November 21, Correll unlawfully interrogated an employee. This apparently refers to a conversation Correll had with Hunter 2 weeks or so after his arrival. During the course of this conversation, Correll did ask Hunter about employees' union sympathies and whether in the event of a rerun election the vote would be the same. While Correll did not deny the substance of this conversation, he testified that it was initiated by Hunter; and therefore, contends the Respondent, as Correll made no promises of benefits or threats, it was not unlawful.

I conclude, as testified to by Hunter, that Correll did initiate the conversation and did question an employee known to be the principal union activist concerning employees' union sympathies shortly after the election and during the time when the Employer's objections were pending. This I believe was impermissible interrogation and violative of Section 8(a)(1) of the Act.

The allegation concerning threats made by Durham on an unknown date between August 1 and November 1, 1979, apparently involved the event testified to by Smith occurring 2 days prior to the election (other threats by Durham having been found, *supra*). Smith testified without contradiction that Durham:

> . . . told me that he liked me and told me I shouldn't be wearing those buttons because the Company is going to be picking on the guys that is wearing those buttons and they were going to give them a hard time and they was going to be watching them . . . .

Based on this undenied testimony, I conclude that Durham, as alleged, threatened an employee in violation of Section 8(a)(1) of the Act.

The General Counsel urges that a January interrogation of Bray by Durham also be found a violation al-

though not alleged, on grounds that it was fully litigated. Inasmuch as Durham did not testify and the Respondent was given no notice of this particular allegation, it cannot be said that the matter was fully litigated. Though the Respondent's failure to bring forth Durham to contradict certain allegations against him was critical as to the resolution of those issues, the Respondent was not bound to anticipate allegations involving Durham not set forth in the complaint. The Respondent did not litigate this issue nor should the failure to do so be tantamount to an admission, where the Respondent was given no notice of the alleged violation. No motion to amend was made at the hearing. I conclude that it would be inapposite to find that the questioning by Durham, or any other statement he made not specifically alleged, be found an unfair labor practice. I decline to conclude that the January event involving Bray was interrogation in violation of the Act.

The allegation that in late November Correll threatened some employees with discharge apparently refers to an incident testified to by Smith that Correll told him that "because of my bad attitude that he was going to take me and throw me on the shears and if I don't like that I can hit the gate." This was denied, I think credibly, by Correll. Further, I do not believe that Smith was a reliable witness, particularly with regard to this type of testimony, *infra*. I therefore conclude that the event did not occur and that the General Counsel has failed to sustain his burden of proving the allegations contained in paragraph 5(c) of this consolidated complaint.

According to the undenied testimony of Louie Bray, sometime in December or early January he had a conversation with Tatman concerning the Union. During the course of this conversation Tatman stated that he felt the Union was just a "big front" and that the Union would cost people jobs. Clearly in the context of the organizational campaign and the fact that the Employer's objections had still not been resolved, to render such a comment to an employee is more a threat than a prediction I therefore conclude that as alleged in paragraph 5(d) of the consolidated complaint that the Respondent through Tatman violated Section 8(a)(1) of the Act.

3. The allegations in Cases 25-CA-12049 and 25-CA-12082

The substance of these charges, set forth in paragraphs 6(d) and (e) of the consolidated complaint, is that in early December Smith was discriminatorily transferred from the wrap machine to the shear machine, that in early February 1980 he was given a verbal warning, and on March 13, 1980, he was discharged. All these events were alleged to have been motivated by Smith's activity on behalf of the Union and were therefore violative of Section 8(a)(3) of the Act. I shall recommend dismissal of these allegations.

The fact of Smith's change in jobs, the verbal warning, and the discharge are undisputed. The question is whether any of these was caused by Smith's activity on behalf of the Union or to discriminate against an employee in general because of the protected activity. As has been noted by the Board and courts on many occasions, a finding of antiunion motivation is seldom based on direct evidence, for employers rarely, if ever, admit an antiunion motivation. On the other hand, an employer's self-serving denial of such motivation need not be accepted. In short, whether the Respondent here was motivated by Smith's union activity can, and indeed must, be determined from reasonable inferences drawn from the record as a whole. See *Shattuck Denn Mining Corporation (Iron King Branch)* v. *N.L.R.B.*, 362 F.2d 466 (9th Cir. 1965). In *Wright Line, supra*, the Board adopted a standard of analysis applicable not only to dual motive situations (as in *Wright Line*) but also to 8(a)(3) cases generally. Once the General Counsel has established through evidence and reasonable inferences a *prima facie* showing that the discharge was motivated in part, at least, by the union activity the burden shifts to the respondent to show that the discharge would have occurred in the absence of union activity. This, of course, is a matter of persuasion from all the evidence, both because the General Counsel always retains the burden of proof and because what would have happened absent the union activity is not provable. After all, the facts cannot be changed.

Given the timing of Smith's discharge, the Respondent's preelection conduct against the Union and Smith's known position, it is reasonable to infer that the union activity played a part. Thus, the question is whether he would have been transferred, disciplined, or discharged absent the union activity. As indicated, the answer to this question largely is a matter of inference considering such factors as the Respondent's reaction in similar situations prior to the union activity; the nature of the employee's wrong for which he was disciplined or discharged; the treatment of other union sympathizers, and any statements made to Smith (or other alleged discriminatees) at the time of the event. From my review of the entire record, I believe that the evidence preponderates in favor of concluding that even absent the union activity Smith would have been transferred when he was, would have been disciplined as he was, and would have been discharged on March 13—if he had committed the same misconduct. I conclude that his union activity played no part in these events.

First an inference of unlawful discrimination against Smith is based on certain statements allegedly made to Smith by Correll referred to above, wherein Correll is supposed to have said something to the effect that Smith was thrown on the shear machine because of his bad attitude and if he did not like it he could quit. I found Smith to be an unreliable witness and specifically conclude that this alleged statement to him by Correll did not occur.

In addition to his negative demeanor, it developed at the hearing that Smith testified to several material statements allegedly made to him by supervision which were not set forth in the investigatory affidavit taken by the Board agent. Smith sought to explain this by stating that the Board agent had not asked him the appropriate question or he had "forgotten." I find incredible that matters of such significance would not have been included in the investigatory affidavit if in fact they had occurred. These involve standard areas of inquiry and concern events not normally forgotten. For instance, Smith testified that Brewer told him he was going to give the employees a

"hard time" for wearing union buttons and that some of them "would be fired." Such a statement by high-level management is not trivial or a detail which might be overlooked or forgotten. Such is substantial and material to proving animus against the Union and ultimately unlawful motivation. I do not accept Smith's assertion that he was not asked about this subject matter. Similarly, in his affidavit Smith referred to the steel he had miscut and for which he was disciplined, "I doubt it [the steel] could be used." He testified to the contrary at the hearing and then explained that he meant in his affidavit that he doubted that the steel could be used "that day." This is incredible. Finally, with relation to having made manufacturing mistakes, Smith just plain changed his testimony, at first admitting that he had made mistakes and subsequently indicating he had not.

Therefore, where Smith's assertions are disputed, particularly by Correll and Tatman, whom I found generally credible, I credit their version of the events and discredit Smith.

Absent Smith's unreliable testimony, that he was transferred from the wrap machine to the shear machine, does not appear to be a matter of particular significance. Nor does it appear that the work of a shear operator was more onerous than that of a wrap machine operator. Indeed, the preponderance of credible testimony in this matter is that employees are generally trained to operate all but the most skilled machines and are transferred among machines as the need arises. The fact that Smith may have been transferred from the wrap machine to the shear following the election does not, in and of itself, prove that it was motivated by union animus. The mere fact that one event follows another chronologically does not prove the second has any causal relationship to the first. See, e.g., *Deven Lithographers, Inc.*, and *Cavalier Multicolor Corp.*, 224 NLRB 648 (1976). While the wrap machine job is a higher pay rate than the shears, Smith retained his pay grade.

Finally, there is no reason to believe that Smith would be singled out to be discriminatorily transferred because of his union activity. There is no evidence that he was a particularly strong advocate on behalf of the Union. While he did participate in the union activity and was known to have done so, most of the other employees were similarly involved. Smith was not a leader. On the other hand, the principal leader of the union activity, Ray Hunter, was not treated discriminatorily.

Given that the Company had transferred employees from time to time, that there is no reason to believe that Smith would be singled out, and that the Company did not discriminate against the principal leader of the union activity, all leads me to conclude that the inference of a discriminatory motive based simply on the fact of the transfer is not warranted.

I similarly conclude that the verbal warning given to Smith in February was not unlawfully motivated. In part, the contention that Smith was discriminatorily disciplined for making a manufacturing mistake is based on the General Counsel's allegation in paragraph 6(c)(ii) of the consolidated complaint (Case 25–CA–12113) that the Respondent unilaterally and discriminatorily imposed and enforced more strict production standards than had previously existed. As I find that the Respondent did not violate the Act in this respect, *infra*, and as I find otherwise that Smith did in fact make a manufacturing mistake of sufficient magnitude to justify a written warning, I conclude that the Respondent did not in this manner violate the Act.

Specifically, although Smith tends to minimize the manufacturing mistake he made on or about February 13, there is nevertheless little question that he cut a job out of the wrong width of steel. The job had to be done over, and the material he used was scrapped. Shearmen are furnished gages, yet Smith admitted he did not measure the steel he used. Though Smith made other, and substantial, mistakes for which he was disciplined, it is only the warning of February 13 that is alleged unlawful. The General Counsel minimized the nature of Smith's mistake, but it did involve some 4,600 pounds of steel. Though the steel might be reused on another occasion, there was nevertheless some cost to the Company.

I conclude that it is not *prima facie* unlawful for an employer to discipline an employee for making a manufacturing mistake of this type or warning him that having made mistakes in the past and in view of his poor attendance record, such would constitute a "final warning." Absent a finding that the system of discipline for making manufacturing mistakes is unlawful, absent a finding that the Company would be motivated to single out Smith for discriminatory treatment, and given the fact that Smith did make manufacturing mistakes for which some discipline is reasonable, I conclude that the General Counsel has not proven that Smith was given a verbal warning in violation of Section 8(a)(3) of the Act.

Less than a month later, Smith cut a job out of 5-1/2-inch steel rather than the 5-inch steel provided in the blueprints. Again he had neglected to measure the steel he used. With this, superimposed on the "final warning," the Respondent undertook to discharge him. The General Counsel contends that Smith was discharged for miscutting "four pieces of steel," a trivial mistake therefore implying that the true motivation lay elsewhere. I conclude that Smith's pattern of carelessness was not trivial. Rather such was reasonable cause for discharge, given his past performance. The fact that one has participated in union activity does not insulate him from discipline for poor performance. Nor does it justify mistakes of the type Smith was making—not measuring the material when selecting it to do a particular job, thus causing wastage of time and material. Hunter testified that, about a week prior to Smith's discharge, Tatman asked him why Smith "was making so many mistakes, and I said Don, I said the man is probably not paying attention to what he is doing."

Smith testified that, following his discharge, Correll said something to the effect that, once the union activity was resolved, he could have his job back or in any event Correll would give him a positive recommendation. Correll denied this, a denial which I credit over Smith's assertion. Again, I found Smith to be an unreliable witness and in any event it simply stretches credulity to believe that the president of the Company having discharged the employee for allegedly pretextual reasons would then

make a statement to that employee supplying an unlawful motive.

Correll admitted, and I find, that when Smith returned to the plant for his paycheck he did wish him good luck. Such is certainly not an admission of an antiunion motive or otherwise evidence of an unfair labor practice. I therefore conclude that the General Counsel failed to establish by a preponderance of the credible evidence the allegations set forth in Cases 25-CA-12049 and 25-CA-12082, alleged in the consolidated complaint paragraphs 6(b) and (e) as such relates to Roger Smith. I therefore will recommend that this complaint be dismissed in its entirety.

4. The allegations in Case 25-CA-12113

In paragraph 6(c) of the consolidated complaint, it is alleged that the Respondent unilaterally imposed new and more stringent rules on employees concerning attendance, production standards, and freedom of talk during working hours. It is alleged that these new and more stringent standards were discriminatory in violation of Section 8(a)(3) and unilaterally imposed (that is, without consultation or negotiation with the Union) in violation of Section 8(a)(5). Although the documentary evidence establishes that prior to the advent of the union activity the Respondent had in fact disciplined and even discharged employees for excessive tardiness/absenteeism and production mistakes, the Respondent, nevertheless, admits that beginning January 1980 it did seek to be more strict about these matters.[4] And the documentary evidence tends to support the Respondent's admission that it has been more strict in disciplining employees for attendance.

The Respondent contends, however, that it was not motivated by the employees' union activity in applying more strict attendance requirements. Rather, it asserts that employees' poor attendance was having a substantial impact on the Respondent's productivity—pounds of product against payroll. Correll credibly and undeniably testified that he learned shortly after assuming the presidency of Respondent that as much as 10 percent of the Respondent's monthly payroll involved employees furnished by a temporary employment service. He testified, again without contradiction, that these employees generally were not as familiar with the Respondent's operation as regular employees; thus, even though the employment service was paid roughly the same as a regular employee would receive on an hourly basis, the temporary employees were not as productive. Correll testified that, upon learning this, he undertook to reduce the number of temporary employees and the method he chose was to require more strict adherence to time and attendance from his permanent employees. Over several months, according to his records, the attendance of the permanent employees improved to the point where the reliance on temporary employees was reduced to zero. As a consequence, the payroll cost per pound of product was reduced.

In a similar vein, Correll sought to eliminate manufacturing mistakes of the type made by Smith outlined above. Although the General Counsel contends that the manufacturing mistakes were not a problem, inasmuch as the scrap steel could be used for other jobs, there really is no question that when an employee spends time on a job which cannot be used at a minimum his effort has been wasted. And such is an unrecoverable cost item to the Company. Indeed, Ray Hunter testified that he told Correll, shortly after Correll's taking over as president, that mistakes being made by the employees should be eliminated. He told Correll that the type of mistakes committed by Smith, for instance, would eventually cost the Company money.

According to Hunter, since Correll has become president there has been a more strict enforcement of rules and production has improved. Although there may be some room for argument concerning how much it cost the Company for an employee to make a mistake on a given job, there is no dispute that manufacturing mistakes affect productivity.

From the totality of the Respondent's documentary evidence and generally credible testimony in this matter, I cannot conclude that the Respondent's concern about manufacturing mistakes was frivolous. Nor were the mistakes being made so trivial as to conclude that the claim of trying to eliminate them was a pretext for more strict discipline of employees for their union activities.

Though the more strict enforcement of the company rules with regard to attendance and attentiveness might be *prima facie* discriminatory, given the timing of these events, the Company has established a sufficient economic justification so as to conclude that the instigation of these rules was not violative of the Act. See *N.L.R.B.* v. *Great Dane Trailers, supra*. Further, the only evidence of an unlawful motivation with regard to the instigation of these more strict rules is the fact that they followed the election. They also followed a change in management. There is no independent evidence that the Company undertook them for discriminatory reasons. To the contrary, the Union's principal advocate, Ray Hunter, counseled with Correll about the mistake problem.

It is also alleged that the Respondent discriminatorily imposed and enforced rules restricting employees freedom to talk during working hours. There is no evidence of such other than that which was discussed above in connection with the allegations in Case 25-CA-11409 wherein it was found that Durham did impose more strict rules on employees. To the extent this allegation involves additional matters, I conclude that such has not been proven; and to the extent it is merely a recapitulation of the allegations with regard to Durham in Case 25-CA-11409, the unfair labor practice alleged has already been found.

The General Counsel further contends that these new rules were imposed unilaterally and thus violative of Section 8(a)(5), inasmuch as the Union had been designated by a majority of the Respondent's production and maintenance employees to be their representative for purposes of collective bargaining.

[4] The discipline system is set forth in a letter to employees from Yard dated September 26, 1979, which apparently supersedes his letter of January 30, 1978, and contains one less step than previously.

With regard to the question of whether and to what extent the Respondent was required to bargain with the Union concerning such matters pending certification, suffice it that there is no evidence that the new rules were imposed unilaterally. An element of the General Counsel's *prima facie* case in this respect is the absence of notification to the Union. There is no testimony from any representative of the Union, or Hunter (who was an employee spokesman for the Union and a member of the negotiating committee), tending to prove that the Respondent did not in fact notify the Union about its determination to adopt more strict rules with regard to attendance and attentiveness to work. To the contrary, it appears that Hunter was consulted and did have input concerning these matters. In any event, I cannot assume the existence of the fact crucial to establishing an unfair labor practice. Therefore, I conclude that the General Counsel has not established by a preponderance of the credible evidence that the Respondent committed a violation of Section 8(a)(5) as alleged. Accordingly, the allegations in Case 25-CA-12113 as embodied in paragraphs 6(c), 8, and 9 of the consolidated complaint should be dismissed in their entirety.

5. The allegations in Case 25-CA-12021

The allegations in this charge, embodied in paragraph 6(d) of the consolidated complaint, involve the contention that Steve Anderson received a verbal warning in January, written warnings in February and March, and ultimately was suspended in April in violation of Section 8(a)(3) of the Act and pursuant to the Respondent's unlawful imposition of more strict attendance and work standards. At the hearing the General Counsel moved, without opposition from the Respondent, to withdraw these allegations. Accordingly, the allegations in Case 25-CA-12021, as set forth in paragraph 6(d) of the consolidated complaint, are dismissed in their entirety.

6. The allegations in Case 25-CA-12090

In Case 25-CA-12090, paragraph 6(e) of the consolidated complaint, it is alleged that on February 8, 1980, Louie Bray was discriminatorily given a 3-day suspension and on April 14 was discharged in violation of Section 8(a)(3) of the Act. I conclude that the suspension and the discharge were not motivated by the Union or other protected activity.

Bray was a known union adherent, having worn a button and sticker on September 25. He was not, however, more active in the organization campaign than the average employee. In any event, following the election, Tatman asked Bray if he would consider a job transfer—to be assigned as the crane operator. Tatman told Bray that he felt Bray's education and experience with the Company would well qualify him for this job. Bray asked for a few days to consider the matter and then agreed. In late November or early December Bray was assigned to be the crane operator which was a promotion to a higher pay classification and would ultimately involve a pay increase. (He was not recommended for the first raise he was to receive because of his poor performance, *infra.*) The fact that Bray was promoted to this job is a factor indicating that the Respondent had no particular animus against him because of his union activity.

The crane has a 5-ton capacity but the boom is limited to 6,000 pounds, which fact is stenciled on the side of the boom. Though the General Counsel seems to argue that it was not bad practice for Bray to lift loads up to 10,000 pounds, I conclude that he was specifically limited to loads of no more than 6,000 pounds, a fact which he knew or in exercise of reasonable diligence should have known. All he had to do was look at the boom. And operating machinery in excess of limits is a serious matter.

This is material because on February 8 Bray was called upon to off-load from a truck some bundles of steel which weighed 10,000 to 11,000 pounds. He claims that he had attempted to contact Tatman and his supervisor concerning what to do about this but was unable to do so, and because it was late on Friday afternoon, he determined to lift these bundles although he realized that they might be "a little heavy." When the management learned in March that Bray had used the crane to lift bundles in excess of 10,000 pounds (almost double the weight limitation of the boom) the Respondent suspended him for 3 days, Bray having admitted lifting the bundles in question. He could have broken down the bundles.

On April 13 Bray, operating the crane, and other employees, including Hunter and Supervisor Danny McComas, were taking inventory. This job lasted from about 7 a.m. until about 9 p.m. On several occasions, according to the testimony of Hunter, he told Bray to slow down his operation of the crane, that someone might get hurt. Then about 8:30 p.m., while lowering a bundle of steel into a bay area, Bray so operated the crane as to break the scale that was attached to the boom. The scale, valued in the approximate amount of $2,100, was totally destroyed. The next day Bray was discharged for this and, according to company witnesses, previous work mistakes.

Bray testified that he broke the scale because McComas had "hollered" at him averting his attention and, for some reason he could not explain, he was unable to get his finger off the down button. That Bray was "hollered" at is denied by McComas, Hunter testifying that McComas "said something to him."[5] In any event, Bray did not explain why he continued to operate the crane with his attention diverted.

The preponderance of the evidence supports the conclusion that the scale was broken because of Bray's inattentiveness to his job. This fact was known to the Respondent prior to discharging Bray. Correll contacted Hunter asking how the accident happened. Hunter said that it was probably a result of Bray's not paying attention.

The principal thrust of the General Counsel's argument is that the destruction of the scale was an "unavoidable accident," thus discharging Bray for this reason raises an inference that the true motive lay elsewhere. However, the preponderance of the evidence, in-

[5] This and other material matters to which Bray testified were not in his affidavit, thus casting doubt on his credibility. However, the reliability of Bray as a witness is not of great importance here.

cluding Bray's admissions, is that it was not an unavoidable accident. The damage was caused by Bray's failure to lift his finger off the down button. The damage caused by Bray clearly was avoidable and such was the essence of Hunter's comment to Correll. Bray's lifting loads well in excess of safety limits was also avoidable.

The General Counsel argues that Hunter used the words "could have" to Correll thus the Respondent did not have substantial justification for discharging Bray for inattentiveness. However, I conclude that the investigation of this event by Correll was sufficient, from which he could reasonably have concluded that Bray caused the $2,100 worth of damage because of inattentiveness to his job. Superimposed on his previous work performance, such certainly is grounds for discharge, adequate to negate an inference that the Respondent seized upon it as a pretext to disguise its true motive in discharging a known union adherent.

There is no evidence that the Respondent has tolerated employees destroying company property due to inattentiveness. Nor is there any particular reason to believe that the Respondent would single out Bray to discriminate against because of his union activity. Indeed, though known to have been a supporter of the Union, Bray was nevertheless promoted to the job as a crane operator following the election. The fact that he was unable to perform this job was not because of any lack of physical and mental ability but simply because of carelessness. That his performance was poor does not tend to prove that the Respondent in any way acted with a discriminatory motive in connection with Bray's tenure of employment. I accordingly conclude that the General Counsel has failed to establish by a preponderance of the credible evidence the allegations set forth in Case 25-CA-12090. I shall recommend that these allegations be dismissed in their entirety.

7. The allegations in Case 25-CA-12191

In a separate complaint, consolidated for hearing with above cases, it is alleged that James Patterson, Jr., was verbally warned on January 11, 1980, given a written notice on February 3, a 3-day suspension on March 27, two written warnings on April 15, and was discharged on that day, all because of his interest in and activity on behalf of the Union and because he had filed a charge with the Equal Employment Opportunity Commission on November 20, 1979. The Respondent is alleged to have violated Section 8(a)(1) and (3). I conclude, for the reasons hereinafter given, that Patterson was disciplined and discharged for cause and not in violation of the Act.

Patterson worked on the second shift (3 to 11 p.m.). According to his testimony, in June 1979 and before the beginning of any union activity, he approached Brewer asking for transfer to the first shift so that in September he could continue his formal education. Brewer, according to Patterson, said that he did not know if he could make such a transfer but would look into it. Patterson was not transferred and apparently nothing more was said by him or Brewer concerning this matter until early November, presumably following the election. At this time Patterson asked Tatman to be transferred but was advised that the Company had no openings on the first shift. Patterson then talked to Correll who ended their conversation saying, "he would get back with me."

That same day (November 20) following the conversation with Correll, Patterson determined to file a charge of racial discrimination with the Equal Employment Opportunity Commission contending that the Respondent had discriminatorily refused to transfer him as requested.[6]

The next evening Patterson was asked by Tatman if he would consider a transfer to the third shift because nothing was available on the first shift.[7] While Patterson testified that he told Tatman he would prefer the first shift, he would accept the third. He was transferred, which, incidentally, involved a promotion and pay increase.

Patterson further testified that he told Correll he would quit if he was not transferred off the second shift. He admitted that, if the Company had wanted to get rid of him, it need only not have transferred him on November 20 and he would have quit.

The record reveals that on several occasions from September to November 1979 Patterson had been tardy or absent and had received a reprimand for loafing on September 21. These incidences of discipline are not alleged to be violations even though Patterson was known to be a union supporter and they occurred during the organizational campaign. Alleged as unlawful are the disciplines Patterson received from and after January 11, 1980.

Patterson contended that he had not been tardy prior to January 11 and on that day only 4 minutes, suggesting that the reprimand he received on January 11 was excessive. However, he ultimately admitted on cross-examination that he had been tardy 2 hours and 12 minutes on December 9, 9 minutes on December 18, and that in fact on January 11 he was tardy by 1 hour and 26 minutes. Patterson's testimony concerning how many times he had been tardy or absent was so evasive as to cast doubt on his general credibility. Patterson's general evasiveness leads me to conclude that his attendance record was substantially worse than he indicated on examination and he knew it.[8]

There is nothing in the record to indicate that Patterson's activity on behalf of the Union was particularly extensive. He did wear a union button on September 25, along with most of the other employees, and did sign an authorization card. Beyond that there is no reason to believe that the Company would have singled him out to

[6] The charge was dismissed. Nevertheless, to file a complaint with a governmental agency of this type is generally protected concerted activity notwithstanding its merit. E.g., *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975).

[7] There is no evidence that the EEOC charge was known to the Company at this time or in fact was ever known by company officials to have been filed.

[8] Additionally, affecting his credibility is the fact that in his investigatory affidavit he did not suggest that his supervisor had given him permission to park his motorcycle in the plant as he testified. Such is material, inasmuch as the precipitating cause of his discharge was his parking his motorcycle in the plant. The mere omission from an investigatory affidavit of a detail or immaterial fact would not be cause for any particular inference. However, the omission of a fact crucial to the ultimate issue of one's discharge raises a substantial question concerning his credibility.

discriminate against him for his union activity. Further, had the Company been predisposed to discriminate against Patterson because of his union activity it hardly would have granted him the requested transfer and promotion. Indeed, had the Company wanted to be rid of Patterson it need only have denied him the transfer and he would have quit as he threatened.

The fact that Patterson was tardy an hour and 26 minutes on January 11 is sufficient I conclude to support a verbal warning for tardiness. The Company's act here does not raise an inference of some motive other than discipline for tardiness.

A few days prior to February 3, Patterson was observed throwing rather than placing springs on the conveyor belt. This was the subject of a written reprimand because, if the springs are not properly put on the conveyor belt, there is a possibility that the heat of the furnace will cause them to unbend and lose springiness. While Patterson tended to minimize this event, he did not deny it, nor the Company's contention that it is important to place springs on the conveyor belt properly. The warning given Patterson on February 3 does not appear unreasonable. I cannot infer that it was discriminatorily motivated.

A review of Patterson's timecards shows that on January 22 he worked half an hour and then left; he was tardy 1 hour and 34 minutes on February 7; he left 2-1/2 hours early on February 19; he was late 2-1/2 hours on March 11; he was late 27 minutes on March 25; he was late 10 minutes on March 26; and on March 27 he was absent. It was this absence, superimposed on his history of tardiness, that caused the Respondent to give him a 3-day suspension on March 27. In view of Patterson's attendance record and the absence of any direct evidence of any antiunion motivation against Patterson, I conclude that the suspension was not violative of Section 8(a)(3).

On April 15 Patterson was discharged. The night before, in violation of plant rules about which he had been informed, Patterson had parked his motorcycle inside the plant premises. Though Patterson testified that he had been given permission by his foreman to so park his motorcycle, I conclude that he had not. His testimony that he had been given permission is simply incredible, *supra*.

Beyond this, I conclude that in fact the reason for the discharge was precisely that testified to by witnesses for the Respondent—his general work record over the last several months and the insubordination of parking his motorcycle on the plant premises.

There is no direct evidence that the Respondent was motivated to discharge Patterson for his minimal union activity or, as alleged by the General Counsel, his having filed a charge, ultimately dismissed, with the Equal Employment Opportunity Commission. In fact, there is no evidence the Respondent was ever served with this charge, or otherwise knew about it. On the contrary, Patterson's attendance and work record was sufficiently poor beginning in September 1979 that reasonable management would discipline and ultimately terminate him. The fact that Patterson was disciplined and terminated under these circumstances certainly does not raise an inference of an unlawful motivation.

Accordingly, I conclude that the General Counsel has failed to prove by a preponderance of the credible evidence the allegations set forth in Case 25-CA-12191, and I will recommend that this complaint be dismissed in its entirety.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

Those unfair labor practices found above, occurring in connection with the Respondent's operation, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

V. THE REMEDY

Having concluded that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including offering immediate reinstatement to Patrick Kimes to his former job or, if that job no longer exists, to a substantially equivalent position of employment, and make him whole for any losses that he may have suffered as a result of the discrimination against him in accordance with the formula as set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as provided for in *Florida Steel Corporation*, 231 NLRB 651 (1977).[9]

Those allegations of unfair labor practices which I have found that the General Counsel has not proven by a preponderance of the credible evidence, I shall recommend be dismissed.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this matter, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[10]

The Respondent, Service Spring Company, a Division of Garlock, Inc., a wholly-owned subsidiary of Colt Industries, Indianapolis, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their interest in or activity on behalf of the Union.

(b) Threatening employees with stricter enforcement of rules or other reprisals because they have engaged in activity on behalf of the Union.

(c) Ordering employees not to wear union insignia, badges, or stickers on company premises.

[9] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(d) Threatening employees that the Company would engage in surveillance of their activities on behalf of the Union.

(e) Soliciting grievances from employees and impliedly promising to resolve such grievances in order to discourage their activity on behalf of the Union.

(f) Granting employees benefits in the form of improved working conditions in order to discourage their interest in or activity on behalf of the Union.[11]

(g) Discriminating against employees by enforcing work rules more strictly because of their interest in or activity on behalf of the Union.

(h) Discharging or otherwise discriminating against employees because of their interest in or activity on behalf of the Union.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[12]

2. Take the following affirmative action:

(a) Offer immediate reinstatement to Patrick Kimes to his former job or, if that job no longer exists, to a substantially equivalent position of employment, and make him whole in accordance with the formula set forth in the remedy section above.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and interest due under the terms of this Order.

(c) Post at its Indianapolis, Indiana, facility copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Dirctor for Region 25, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that all allegations of unfair labor practices not found herein are dismissed. Specifically the allegations in Cases 25-CA-12021, 25-CA-12049, 25-CA-12082, 25-CA-12090, 25-CA-12113, and 25-CA-25191 are dismissed in their entirety.

[11] The improved working conditions are not to be dismantled.

[12] The unfair labor practices found, occurring in connection with the Respondent's preelection campaign against the Union, are sufficiently extensive to make broad injunctive relief appropriate even though I conclude that the postelection allegations were not sustained.

[13] In the event that this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT interrogate our employees concerning their membership in United Steelworkers of America, AFL-CIO-CLC, District 30.

WE WILL NOT threaten our employees with stricter enforcement of rules, discharges, or other reprisals because of their interest in or activity on behalf of the above-named labor organization.

WE WILL NOT order employees to remove any emblems of the above-named labor organization.

WE WILL NOT threaten our employees that we will keep their activity on behalf of the above-named labor organization under surveillance.

WE WILL NOT solicit grievances from our employees nor promise their favorable resolution in order to discourage their activity on behalf of the above-named labor organization.

WE WILL NOT discharge or otherwise discriminate against our employees because of their interest in or activities on behalf of the above-named labor organization.

WE WILL NOT grant benefits to our employees by improving working conditions in order to discourage their activity on behalf of the above-named labor organization.

WE WILL NOT discriminate against employees by altering or making more stringent enforcement of work rules in order to discourage employees' activity on behalf of the above-named labor organization.

WE WILL offer Patrick Mark Kimes immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position of employment, and WE WILL make him whole for any losses he may have suffered as a result of the discrimination against him with interest.

SERVICE SPRING COMPANY, A DIVISION OF GARLOCK, INC., A WHOLLY-OWNED SUBSIDIARY OF COLT INDUSTRIES